

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN FREDERICK GREER,

Defendant-Appellant.

UNPUBLISHED

February 25, 2000

No. 215236

St. Joseph Circuit Court

LC No. 97-008820-FC

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of conspiracy to commit armed robbery, MCL 750.529; MSA 28.797, MCL 750.157a; MSA 28.354(1), and assault with intent to rob while armed, MCL 750.89; MSA 28.284. Defendant was sentenced to concurrent terms of seven to twenty years' imprisonment. We affirm.

Defendant first argues that the trial court erred because, when the probate court waived jurisdiction to the circuit court, he was not given a preliminary examination. Defendant claims that he was entitled to a preliminary examination under *People v Dunigan*, 409 Mich 765; 298 NW2d 430 (1980), and MCL 767.42; MSA 28.982, before a criminal information could be filed against him. Defendant's claim is without merit.

Defendant received a probable cause hearing pursuant to MCL 712A.4(3); MSA 27.3178(598.4)(3), in juvenile court. This probable cause hearing is the equivalent of a preliminary examination. MCL 712A.4(10); MSA 27.3178(598.4)(10). As a result, defendant's claim that he did not receive a preliminary examination is without merit.

Next, defendant argues that the prosecution failed to present sufficient evidence to sustain defendant's convictions beyond a reasonable doubt. First, defendant claims that the evidence did not show that defendant was the perpetrator of the crimes. Defendant also argues that the testimony at trial was inconsistent and was not sufficient to show defendant committed the crimes. These claims are without merit.

Viewing the evidence in the light most favorable to the prosecution, this Court concludes that a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). One of the alleged co-conspirators testified that, after defendant and others overheard the complainant say that he had some one-hundred-dollar bills in his wallet, defendant suggested that they should rob complainant. The co-conspirators discussed a plan, obtained sticks to use as weapons, and then hid and waited for complainant. This testimony provided ample evidence for the jury to convict defendant beyond a reasonable doubt of conspiracy to commit armed robbery. *People v Justice*, 454 Mich 334, 345-346; 562 NW2d 652 (1997); *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

There was also ample evidence to support the conviction of assault with intent to rob while armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). One of the co-conspirators testified that he saw defendant pursuing complainant down the alley with a stick and that defendant was swinging the stick at complainant. Complainant testified that two men pursued him, one with a ski mask and another who was not wearing anything on his head. Complainant stated that the two men hit him with sticks and tried to reach in his pockets. Complainant noted that the man wearing the ski mask had tanned skin and had a mark below his left eye. Officer Jason Sloane, who conducted the investigation into the attack, testified that, when he questioned defendant, defendant had tanned skin and a mark below his left eye on the day after the attack, matching the description by complainant. This evidence and the reasonable inferences from this evidence are sufficient to support a conviction of assault with intent to rob while armed.

Defendant also argues that the prosecutor committed misconduct during his questioning of a prosecution witness at trial and during his closing argument. Defendant did not raise this objection below. Defendant argues that the prosecutor acted inappropriately when he asked the witness, during direct and cross-examination, if the prosecutor's office offered to recommend a sentence to the court in exchange for his "truthful" testimony. Defendant argues that these remarks effectively gave credibility to the witnesses testimony. There is no merit to this claim. The mere reference by the prosecutor to a plea agreement containing a promise of truthfulness is in itself not grounds for reversal. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Defendant also objects to comments, which are outlined below, that the prosecutor made during closing argument to the jury.

And you're right. [Prosecution witness] Ferrell snitched out. It [Ferrell's testimony] isn't bought and paid for though, Ladies and Gentlemen.

Two guys walk in a bank, hoods over their face. Rob somebody. Shoot and kill somebody. By chance we happen to catch one of them. I've got a choice don't I? Let them both go. Couldn't catch the guy that did the B & E. He says hey man, cut me a deal, I can tell you who robbed the bank because I was one of them.

So what do I say as a prosecutor? On no, we ain't giving you no deals on the bank job. How can I prove the guy that wants to make the deal even did the bank job? So do I as a prosecutor say no, I think I'll let you both go.

I'm sorry. In this game sometimes we have to make deals we may not like to. But without the testimony of James Ferrell we wouldn't even have known who was in the car let alone who was in that alley doing that robbery.

These comments, defendant argues, were specifically designed (1) to vouch for the credibility of Ferrell; (2) to buttress the prosecutor's theory of the case; (3) to elicit sympathy from the jury on his role as a prosecutor; (4) to instill a civic duty on the part of the jury to find defendant guilty; and (5) to shock the jurors by interjecting issues beyond the scope of the issues at trial. We do not agree.

On review, we decide these questions on a case-by-case basis and evaluate the prosecutor's remarks within the context of the pertinent portion of the record. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Because defense counsel failed to object to these remarks at trial, review of this error is precluded unless the prejudicial effect of the remarks was so great that it could not have been cured by an appropriate instruction or failure to consider the issue would result in a miscarriage of justice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

Here, the prosecutor's remarks were made in rebuttal to a challenge made by defense counsel that Ferrell's testimony was "bought and paid for" by the prosecutor. The prosecutor did not vouch for Ferrell's credibility and did not state or imply that he had some special knowledge regarding the truthfulness of Ferrell's testimony. The prosecutor merely argued that the plea agreement with Ferrell was the only way in which the prosecution could obtain any testimony implicating defendant. Further, any prejudice from the prosecutor's remarks could have been cured with an instruction from the court. We find no miscarriage of justice.

Defendant argues that the trial court erred when it failed to sua sponte read two jury instructions. The first instruction, on mere presence, is enumerated under CJI2d 8.5, and states that the mere fact that a defendant was present during the commission of the crime, is not sufficient to prove that the defendant assisted in committing the crime. The second instruction, the identification instruction, is enumerated under CJI2d 7.8, and generally instructs the jury that the prosecution must prove that the defendant was the person who committed the crime and enumerates factors the jury should consider when determining whether defendant was properly identified. Defendant claims that he specifically presented arguments and evidence on both of these issues and that the trial court's failure to instruct on these issues was error. We do not agree.

This Court reviews jury instructions as a whole to determine whether there is error requiring reversal. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). The instructions must include all the elements of the crime and must not omit defenses and theories if the evidence supports them. *Id.* However, the omission of an instruction is not error warranting reversal if the instructions as a whole cover the substance of the omitted instructions. *People v Bender*, 124 Mich App 571, 575; 335 NW2d 85 (1983).

One of defendant's theories was that his mere presence was insufficient to prove commission of the crime. The trial court adequately instructed the jury that mere presence was not enough prove that defendant was guilty of the crime of conspiracy. The trial court's instruction clearly covered defendant's mere presence theory on the conspiracy count.

However, the trial court did not provide any similar instruction on the assault charge. Nevertheless, the trial court was not required to give an instruction on this theory for the assault charge. A court is only required to instruct sua sponte on defendant's theory if he presents a legally-recognized defense that reduces or negates his culpability. *People v Seabrooks*, 135 Mich App 442, 449-450; 354 NW2d 374 (1984). In defendant's case, his mere presence theory did not present a legally-recognized defense that could have lessened or negated defendant's culpability for assault. Defendant claimed he did not commit the offense and the trial was a credibility contest between defendant's version and the testimony of eyewitnesses. *Id.* Nor was the trial court required to instruct sua sponte on mistaken identification. *Id.* See also *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). As a result, no error occurred.

Defendant next argues that the trial court erred when it instructed the jury on defendant's theory of his case. The court summarized defendant's theory on his case, stating:

It is the People's theory and claim that they proved both charges beyond a reasonable doubt.

It is the Defendant's theory and claim of the case that the prosecution has failed to prove the elements of those two crimes beyond a reasonable doubt.

Defendant complains that this instruction misrepresented his theory of his case because his primary theories were mere presence and mistaken identity. Again, defendant did not request the court to instruct on defendant's theory of the case and he failed to object to this instruction. If the trial court takes it upon itself to instruct the jury on defendant's theory, it must do so accurately. *People v Hayden*, 132 Mich App 273, 291; 348 NW2d 672 (1984). However, even if the instructions are somewhat imperfect, they are still permissible if the instructions fairly present to the jury the issues tried and sufficiently protect the defendant's rights. *Bartlett, supra*, 143-144; *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Again, even if the court did commit error, this Court will not reverse absent manifest injustice. *Bartlett, supra*, 143. We find no manifest injustice in this case. Although the trial court did not address defendant's theories of mere presence and mistaken identity, the trial judge was correct in stating that, in summary, defendant asserted that the prosecution failed to prove the elements of the crime.

Nor was counsel ineffective for failing to ensure that the trial court included instructions on mere presence and mistaken identification or for failing to object to the trial court's instruction on defendant's theory of his case. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, that there is a reasonable probability that, but for counsel's error, the result of the proceedings would

have been different, and that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

In view of the record, we conclude that defendant's counsel at trial was not ineffective because defendant did not show that the results of this proceeding would have been different, despite any error allegedly made by his counsel at trial. Ferrell, a co-conspirator in the crime who knew defendant, testified to defendant's participation in planning the armed robbery and to defendant's attack on complainant. This evidence, if believed, and the reasonable inferences drawn from this testimony were sufficient to convict defendant. Any instruction on mere presence or mistaken identification would not have affected the weight of this evidence.

Defendant also argues that the sentencing court erred because it failed to articulate specific reasons for imposing sentence upon defendant. There is no merit to this claim. It is clear from the record that the sentencing court relied on the guidelines in imposing sentence. This statement satisfies the articulation requirement. *People v Lawson*, 195 Mich App 76, 77; 489 NW2d 147 (1992).

Defendant finally argues that the sentencing judge's sentence was not proportional to defendant's criminal conduct. A sentence imposed within an applicable judicial sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). In light of defendant's significant criminal history as a juvenile and the violent nature of this crime, we find no abuse of discretion in defendant's sentence.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald